INTERIOR BOARD OF INDIAN APPEALS

Native American Management Services, Inc. v. Acting Deputy Assistant Secretary - Indian Affairs (Operations)

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United States Department of the Interior

OFFICE OF HEARINGS AND APPEALS
INTERIOR BOARD OF INDIAN APPEALS
4015 WILSON BOULEVARD
ARLINGTON, VA 22203

NATIVE AMERICAN MANAGEMENT SERVICES, INC.

v.

ACTING DEPUTY ASSISTANT SECRETARY--INDIAN AFFAIRS (OPERATIONS)

IBIA 83-44-A Decided February 19, 1985

Appeal from a June 1, 1983, decision of the Acting Deputy Assistant Secretary--Indian Affairs (Operations) suspending appellant's Buy Indian Act status.

Recommended decision adopted.

1. Indians: Economic Enterprises: Buy Indian Act

   The meaning of "100 percent Indian control" of a business as used under the Buy Indian Act, 25 U.S.C. § 47 (1982), includes not only apparent control, but also actual control as evidenced by some measure of active participation in the business that would tend to increase Indian self-sufficiency.

APPEARANCES: Jeffrey L. Willis, Esq., and Ellen L. Canacakos, Esq., Phoenix, Arizona, for appellant; Daniel L. Jackson, Esq., Office of the Field Solicitor, U.S. Department of the Interior, Phoenix, Arizona, and Percy Squire, Esq., Office of the Solicitor, U.S. Department of the Interior, Washington, D.C., for appellee. Counsel to the Board: Kathryn A. Lynn.

OPINION BY CHIEF ADMINISTRATIVE JUDGE PARRETTE

On August 15, 1983, the Board of Indian Appeals (Board) received a notice of appeal from Native American Management Services, Inc. (appellant). Appellant sought review of a June 1, 1983, decision issued by the Acting Deputy Assistant Secretary--Indian Affairs (Operations) (appellee) suspending its certification as a "Buy Indian" contractor pending further investigation. The suspension was based on a May 25, 1983, memorandum from the Inspector General of the Department of the Interior. The memorandum questioned appellant's qualifications under the Buy Indian Act, 25 U.S.C. § 47 (1982). By order dated September 7, 1983, the Board referred this case to the Hearings Division of the Office of Hearings and Appeals for an evidentiary hearing and recommended decision in accordance with regulations in 43 CFR 4.337. On September 14, 1983, the suspension was vacated pending the decision of this Board.

The case was assigned to Administrative Law Judge Harvey C. Sweitzer, who held a hearing and, on December 4, 1984, issued a recommended decision. Although that decision informed the parties that under 43 CFR 4.338 and 4.339 they had 30 days in which to file exceptions to the recommended decision, no exceptions were filed.

The Board has reviewed the record created before Judge Sweitzer and his recommended decision. The recommended decision, which is attached to this opinion and incorporated by this reference, is adopted in total as the Board's opinion.

Therefore, pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 CFR 4.1, the June 11, 1983, decision of the Acting Deputy Assistant Secretary--Indian Affairs (Operations) to suspend the "Buy Indian" certification of Native American Management Services, Inc., is affirmed.

//original signed
Bernard V. Parrette
Chief Administrative Judge

We concur:

//original signed
Jerry Muskrat
Administrative Judge

//original signed
Anne Poindexter Lewis
Administrative Judge

December 4, 1984

NATIVE AMERICAN MANAGEMENT SERVICES, INC., Appellant	:	Docket No. IBIA 83-44-A
	:	Order Referring Appeal to Hearings Division for Evidentiary Hearing and Recommended Decision
v.	:	
ACTING DEPUTY ASSISTANT SECRETARY--INDIAN AFFAIRS (OPERATIONS), Respondent	:	

RECOMMENDED DECISION

Appearances: Jeffrey L. Willis and Ellen L. Canacakos, of the law firm Streich, Lang, Weeks and Cardon, Phoenix, Arizona, for appellant

Daniel L. Jackson, Office of the Field Solicitor, Department of the Interior, Phoenix, Arizona (Percy Squire, Office of the Solicitor, Washington, D.C., on preheating briefs), for respondent

Before: Administrative Law Judge Sweitzer

By order dated September 7, 1983 the Interior Board of Indian Appeals referred this matter to the Hearings Division for a hearing and a recommended decision, and it was thereafter assigned to me. By my order of October 6, 1983, the hearing was scheduled for December 2, 1983. Based on

stipulated request of the parties, that hearing date was converted to a preheating conference, and the hearing was postponed to March 30, 1984, on which date it was held at Phoenix, Arizona.

Introduction

Appellant Native American Management Services, Inc. (NAMS), is an Arizona corporation organized for the purpose of providing "management consulting services to the Bureau of Indian Affairs." NAMS 1982 Financial Statement. NAMS was certified by the Bureau of Indian Affairs (BIA) as qualifying for preference in contracting with BIA under the "Buy Indian Act," 25 U.S.C. §47 (1982). BIA suspended this certification on June 1, 1983 pending further investigation, alleging NAMS did not meet the BIA's requirement that "Buy Indian" firms be "100 per cent Indian owned and controlled." 20 BIA Manual 2.1. NAMS appealed this action and requested an evidentiary hearing (which was granted by the order of September 7, 1983).

NAMS subsequently moved for summary adjudication, claiming it met the applicable requirements as a matter of law, since the corporation's sole shareholder and both members of the

board of directors were Indian. Respondent BIA argued actual control of NAMS was not in the board of directors, but in the general manager, a non-Indian. Briefs were filed in support of the parties' respective positions. By order of March 2, 1984, I ruled that the question of control of NAMS presented an issue of fact and denied the motion for summary adjudication.

Following the evidentiary hearing briefs were filed as follows: Appellant's opening, June 18, 1984; respondent's answering, July 3, 1984; and appellant's reply, July 30, 1984. In all instances where the findings and conclusions set out in this recommended decision are inconsistent with proposed findings of fact and conclusion of law submitted by counsel, such proposed findings and conclusions are rejected either because they are not supported by the evidence or because they are immaterial.

Issues, Applicable Law and Contentions

The sole issue in this case is whether NAMS is 100 per cent Indian controlled as required by 20 BIA Manual 2.1. If it is not, NAMS does not qualify for the "Buy Indian" preference when dealing with BIA.

The Buy Indian Act provides that "[s]o far as may be practicable Indian labor shall be employed, and purchases of the products of Indian industry may be made in the open market in the discretion of the Secretary of the Interior." 25 U.S.C. §47 (1982). In carrying out the requirements of this statute, BIA has determined that firms must be 100 per cent Indian owned and controlled in order to qualify for this preference. 20 BIA Manual 2.1.

Appellant claims it is in fact 100 per cent Indian owned and controlled. Its sole stockholder is Elbert Vawter, a certified member of the Choctaw Indian Nation. Mr. Vawter is also president of NAMS and is the only person empowered to sign contracts. Mr. Vawter and his brother Silas, also a member of the Choctaw Indian Nation, are presently the only members of the NAMS Board of Directors. Appellant argues these facts show that NAMS is Indian controlled.

Respondent argues that Mr. Vawter is in fact a "straw man" and that his step-son Vaughn Autrey, NAMS' general manager, actually controls NAMS. Mr. Autrey is not a member of any Indian tribe. Respondent claims Mr. Vawter does not participate in, nor exercise control over the functions of the corporation other than signing contracts, change orders, and

proposals; therefore NAMS is not Indian controlled and does not qualify for the "Buy Indian" contracting preference.

Summary of the Evidence

At the evidentiary hearing in this case, Vaughn Autry was the sole witness for appellant; L. Thomas Weaver, Harry McClain, and Walter Michno were witnesses for respondent.

Testimony of Vaughn M. Autrey

Vaughn M. Autrey is presently the general manager of NAMS and is responsible for the day-to-day operations of the company. Tr. 10-11. Mr. Autrey is the step-son of Elbert Vawter, who is president, board member, and sole stockholder of NAMS. Tr. 15.

NAMS, an automated data processing (ADP) consulting firm, was incorporated in the State of Arizona in March 1979. Tr. 15. Vaughn Autrey and his wife (now ex-wife) Karen were the original incorporators of NAMS, Tr. 27; at the time of incorporation, Mr. Vawter contributed ten dollars, which constitutes the only capital put into NAMS. Tr. 33-34. The reason NAMS, with Mr. Vawter participating, was formed was

to qualify for the preferences available under the Buy Indian Act. Tr. 31.

Mr. Autrey is also involved in Vaughn Autrey, Incorporated, an ADP firm in which he is the only person involved. Vaughn Autrey, Inc., is a consultant to private enterprise and state and local government; NAMS deals with the federal government. Tr. 36-38.

Mr. Autrey has been general manager of NAMS since its incorporation, except for the period from November 1982 to November 1983. Tr. 10-11. He is experienced in the ADP field and is responsible for the day-to-day operation of the company. Tr. 11-14. Mr. Autrey, along with his ex-wife Karen, were on the NAMS board of directors from incorporation until approximately March 1981, when they both resigned from the board so NAMS could regain its "Buy Indian" certification. This certification had been suspended on the ground that NAMS was not Indian controlled, and was restored after the Autreys resigned from the board of directors. Tr. 25-28. Mr. Autrey now has, and has had since NAMS' incorporation, signatory power over company checking accounts and the power to commit funds of the corporation. He regularly commits such funds. Tr. 36.

Mr. Elbert Vawter is not experienced in either the ADP or the accounting fields; no such expertise is expected of him. Tr. 24, see also Tr. 53-55. He has not participated in writing proposals for work and is not qualified to review the technical portions of such proposals. Tr. 55-56. He does not have the background to evaluate NAMS' proposals and generally relies on the person presenting the proposal to him to determine if the proposal is acceptable. Tr. 55-58, see also Tr. 68-69. A similar procedure is followed in evaluating contract change orders. When problems of a managerial, personnel, or legal nature arise, they are presented to Mr. Vawter and discussed with him. Tr. 59-60. Mr. Autrey could recall only one occasion when Mr. Vawter actually made a business decision contrary to his (Mr. Autrey's) advice, that involving settlement of a lawsuit by an ex-employee. Tr. 23-24. Mr. Vawter did, however, meet with Mr. Autrey early in NAMS' existence to determine how much they each could be paid. Tr. 43, 68. This function is now performed by the board of directors, of which Mr. Vawter is a member. Tr. 43.

Mr. Vawter is the only person with authority to legally bind NAMS in a contract. Tr. 17. Mr. Autrey testified that Mr. Vawter's responsibilities include "reviewing all of the

documents and overseeing the company, in effect, but he doesn't do it on a day-to-day basis." Tr. 21. Mr. Vawter does not maintain an office at the company's headquarters in Phoenix, Tr. 16, and lives about 15 miles north of Sierra Vista, Arizona, approximately 200 miles southeast of Phoenix. Tr. 16, see also Tr. 130. Mr. Autrey estimated that he communicates with Mr. Vawter concerning company matters "once or twice a month," Tr. 16-17, usually by telephone or personally, seldom by letter. These communications include solicitations and proposals. Tr. 17. Mr. Vawter is provided with company records "as a matter of course." Tr. 17.

Mr. Autrey stated that Mr. Vawter plays little part in the day-to-day operation of NAMS. Tr. 16. Mr. Autrey did say that, following his resignation from the board of directors in March, 1981, he began involving Mr. Vawter "more than he had been prior" to that time. Tr. 30.

Mr. Autrey testified that Mr. Vawter's annual salary from NAMS is $25,000 plus bonuses. Tr. 41-42. But see testimony of Harry T. McClain, infra, Tr. 131, where Mr. Vawter's salary is given as $172.74 per month. Mr. Vawter does not keep a separate time log. Tr. 21. Mr. Autrey's annual

salary from NAMS for the current year was $48,000 plus a $5,000 bonus. Tr. 42.

Mr. Autrey was the only witness for appellant. Tr. 71. Mr. Vawter had recently suffered a stroke, and although mentally alert was unable to attend the hearing. Tr. 9.

Testimony of L. Thomas Weaver

L. Thomas Weaver is a criminal investigator presently with the United States Department of Agriculture and formally with the Department of the Interior. While with the Department of Interior's Inspector General's office, Mr. Weaver was assigned between September 1982 and February 1983 to investigate NAMS. This investigation was started as a result of a "hot line" call regarding NAMS contracts. Tr. 72.

While investigating NAMS, Mr. Weaver interviewed Vaughn Autrey several times. Mr. Weaver testified that Mr. Autrey had stated that he (Mr. Autrey) basically was in charge of NAMS. Tr. 77. Mr. Weaver visited NAMS' offices two or three times but never saw Mr. Vawter there. He was told that Mr. Vawter had no office there. Tr. 79.

Mr. Weaver then testified as to an interview he had with Karen Autrey, Vaughn Autrey's ex-wife, on November 3, 1982, concerning the formation and operation of NAMS. This testimony was accepted over appellant's objections of hearsay with the objections to be considered with regard to the weight to be given the testimony. Tr. 94, see also Tr. 80-94 for arguments regarding admissibility. Mr. Weaver testified Ms. Autrey stated that:

- Vaughn Autrey "ran, operated, and controlled NAMS." Tr. 95.

- "Vawter was used as a figurehead to enable Mr. Autrey to gain BIA contracts." Id.

- Mr. Vawter had "no connection [with NAMS], other than being the Indian." Id.

- Mr. Vawter had no operation or function with regard to the daily operation of the company. Id.

- Mr. Autrey "controlled and wrote" all the contracts and proposals to BIA. Tr. 99.

Mr. Weaver further testified that Ms. Autrey stated that she had written checks to "Cash" on NAMS accounts at Mr. Autrey's direction on at least one occasion. Tr. 99. Mr. Weaver inspected checking account signature cards for two NAMS accounts and found only the signatures of Vaughn Autrey and Karen Autrey. Tr. 100-05. 1/

Cross-examination noted that the exact word "control" does not appear in Mr. Weaver's interview notes. Tr. 115-16. Mr. Weaver did not personally interview Mr. Vawter. Tr. 126.

Testimony of Harry T. McClain

Mr. Harry T. McClain is a special agent for the Office of the Inspector General, United States Department of the Interior. He was assigned, along with Mr. Weaver, to investigate allegations concerning NAMS' contracts with BIA. Tr. 128-29.

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1/ But see Appendix, Appellant's Post Hearing Reply Memorandum, where signature cards for other NAMS accounts, which include Elbert Vawter's signature, are submitted.

Mr. McClain stated that he interviewed Mr. Elbert Vawter on November 2, 1982. Tr. 129. He testified Mr. Vawter related that:

- the purpose of his (Mr. Vawter's) participation in NAMS was to help obtain "Buy Indian" contracts;

- he (Mr. Vawter) has no expertise in ADP programming or management functions;

- his (Mr. Vawter's) sole participation in the corporation was to sign contracts and change orders. Tr. 131.

Mr. McClain testified that Mr. Vawter had stated he received $172.74 per month from NAMS for signing papers and that he had received bonuses up to the time of the November 2, 1982 interview, totalling approximately $12,700.00. Tr. 131. Mr. Vawter further stated to him that he had completed two years of high school and sixteen and one half years working for a plastics manufacturing firm, rising to the position of foreman before he left. Tr. 133. Mr. Vawter stated that his total participation in NAMS was the original contribution of ten dollars and the signing of contracts and change

orders. Tr. 133. He also stated that all other funds necessary for the corporation's formation came from Karen and Vaughn Autrey. Tr. 134.

Mr. McClain interviewed Mr. Chris Pinson, at that time NAMS' general manager, in February 1983. Mr. McClain testified that Mr. Pinson indicated Mr. Vawter "may have been to the [NAMS] office once" and that other than that he did not know Mr. Vawter; and that Mr. Vawter was kept informed of NAMS' activities. Mr. Pinson also commented that Mr. Vawter did not have any technical expertise. Tr. 150-51. Mr. McClain did not himself see Mr. Vawter during the two to four visits he made to NAMS' offices. Tr. 153.

Testimony of Walter Michno

Mr. Walter Michno is an auditor with the Office of the Inspector General, United States Department of the Interior. Mr. Michno was assigned to assist in the NAMS investigation and to audit NAMS' contracts for compliance with contract terms and applicable Federal regulations. Tr. 165-66. The contract Mr. Michno audited was not a "Buy Indian" contract but was awarded to NAMS on a "sole source" basis because NAMS had previously performed a related "Buy Indian" pilot

project. Tr. 176. Mr. Michno never saw Mr. Vawter in the NAMS offices during the approximately four weeks in which he was performing the audit in those offices. Tr. 218.

Mr. Michno did not recall seeing any NAMS checks signed by Mr. Vawter, Tr. 212, nor any payroll checks signed by Mr. Autrey, Tr. 218, but stated it was "quite possible" the "bulk or majority" of the checks were signed by Karen Autrey or Judy Cochran, the company's treasurer. Tr. 215.

Findings of Fact and Conclusions of Law

As stated previously, the resolution of this case turns on whether NAMS is 100 per cent Indian owned and controlled. It is not disputed that Mr. Vawter's ownership of all outstanding NAMS stock constitutes 100 per cent Indian ownership of NAMS. However, the question of control is more difficult to resolve. To determine if Mr. Vawter controls NAMS, two issues must be analyzed: Mr. Vawter's actual role in NAMS; and, what is meant by "control" under the Buy Indian Act.

A. Inquiry into Elbert Vawter's Role in the Operation of NAMS

Appellant argues that "control of a corporation is vested in its Board of Directors and/or majority stockholders."

Appellant's opening brief, captioned its "Post-Hearing Memorandum" (hereinafter "Memo") at 3, citing Mims v. Valley National Bank, 14 Ariz. App. 190, 481 P.2d 876 (1971). Appellant further argues that day-to-day operation of the company may be delegated to others without losing this control. App. Memo at 4-5, citing 2 Fletcher, Corporations. Appellant concludes that, as a result of Mr. Vawter's sole ownership and position on the board of directors, he, along with his brother Silas, controls NAMS. However, the Arizona court in Mims also stated that "this general legal principle [that control of a corporation is in its board] does not eliminate the possibility of actual control by another, as for example, a majority stockholder," 481 P.2d at 878. (emphasis added). The fact of board membership is not per se evidence of control.

Appellant argues that any further inquiry into Mr. Vawter's role in the corporation is impermissible as "piercing the corporate veil." Appellant claims that under Arizona law, before a corporation's veil may be pierced, the opposing party must prove that:

1. There is such a unity of interest and ownership between the corporation and its owners that the separate personalities of the two no longer exist; and

2. Failure to disregard the corporate fiction would result in fraud or injustice.

App. Memo at 1-2, citing Home Builders & Suppliers v. Timberman, 75 Ariz. 337, 256 P.2d 716 (1953); Honeywell, Inc. v. Arnold Const. Co., Inc., 134 Ariz. 153, 654 P.2d 301 (1982); Dietel v. Day, 16 Ariz. App. 206, 492 P.2d 455 (1972).

The instant case may be distinguished from the three cases cited. Timberman, Honeywell, and Dietel each sought to place personal liability for a corporation's debts on a corporate officer. In each case, the court considered the above factors in deciding whether the corporate form, insofar as it protects an officer from personal liability, should be disregarded. In the instant case, individuals within the corporation are being considered not as to personal liability, but only as to their role within the corporation.

The Supreme Court of the United States has stated "the interposition of a corporation will not be allowed to defeat a legislative policy* * * ." Anderson v. Kirkpatrick, 321 U.S. 349, 363 (1944). It is alleged in the present case

that appellant is a corporation with an Indian "straw man" in nominal control, placed there for the purpose of obtaining for the corporation contracts which it could not otherwise obtain, in opposition to a stated legislative policy. Therefore, an inquiry into the actual roles of Mr. Vawter and Mr. Autrey in the NAMS corporate structure is justified.

B. Does Elbert Vawter's Role in NAMS Constitute "Control"?

[1] The resolution of this question turns on the word "control". The definition of "control" varies with subject and context: both parties have cited authority supporting each's preferred definition. App. Memo. at 3-5, Resp. Brief at 11-13.

The requirement for Indian control must be construed with Congress' legislative policy in mind. The Buy Indian preference was "designed to promote Indian economic development and self-sufficiency." Glover Construction Company v. Andrus, 591 F.2d 554, 566 (10th Cir. 1979), aff'd 446 U.S. 608 (1980), (McKay, Cir. J., dissenting). "The purpose of these preferences [25 U.S.C. §§ 44, 45, 46, 47, and 274], as variously expressed in the legislative history, has been to

give Indians a greater participation in their own self-government * * *." Morton v. Mancari, 417 U.S. 535, 591 (1974). The policy of the United States is and should be "to teach * * * Indians to manage their own business * * *," Id. at 542, n. 9, quoting Sen. John Wheeler's comments at hearings on the Indian Reorganization Act of 1934.

The foregoing conspicuously use such terms as "self-sufficiency", "participation" and "manage". This language strongly indicates Congress intended for Indians to become more involved with enterprises such as NAMS.

The language used further implies that such involvement was intended to be active, and should contribute to the growth of Indians and the Indian community by decreasing dependence on non-Indians. I therefore conclude that "100 per cent Indian control" includes not only apparent control, but also actual control as evidenced by some measure of active participation in the corporation.

This active participation need not be to the extent, implied by respondent, that NAMS be "operated" solely by Indians. However, control should include activities which would tend to increase Indian self-sufficiency. Such activities may

include participation in creation of the company's work product; direction of the company, such as deciding what work to pursue and how to accomplish it; planning policy and goals of the company; or other active involvement with the company. As appellant points out, Indians may require some non-Indian assistance and expertise in developing Indian enterprises. This definition of control should not be construed to prohibit such involvement by non-Indians in Buy Indian firms. However, "Indian control" should result, over a period of time, in a firm that could function without non-Indian assistance.

Appellant had the burden of proof in this case. See my order of October 6, 1983. I find that appellant did not carry its burden of establishing that Mr. Vawter's role met the above standard. Evidence presented depicted Mr. Vawter's role in NAMS as essentially reactive, not active: he signs documents as they are presented to him. Mr. Autrey testified to one occasion where Mr. Vawter made a decision contrary to the advice given to him by Mr. Autrey; this concerned settlement of an ex-employee's lawsuit against NAMS, not a technical or usual business decision. Mr. Vawter has no ADP or financial (business) experience and makes no contribution to the firm's operations in those areas. Mr.

Vawter did meet with Mr. Autrey to decide what each of their salaries should be; he still does this (or at least approves of salaries) as a member of the board of directors. However, no evidence of any additional participation by Mr. Vawter in NAMS' business was offered.

The circumstances surrounding NAMS' incorporation also raise doubts concerning Mr. Vawter's actual role. Mr. Autrey was precluded from obtaining BIA contracts for his consulting firm, and formed NAMS, with Mr. Vawter as president, for the purpose of contracting under the Buy Indian Act. NAMS contracts principally with the BIA. It is a reasonable presumption that Mr. Vawter was brought in solely as a "straw man" to qualify for Buy Indian preference. This presumption is strengthened by the fact that, other than his Indian ancestry and ten dollars, Mr. Vawter brought nothing to NAMS essential to its success. Mr. Autrey's testimony, Tr. 31, and Mr. Vawter's statements as testified to by Mr. McClain, Tr. 131, summarized supra, reinforce this view. Appellant did not present evidence sufficient to establish otherwise.

There is also the question raised by Mr. Vawter's benefits from NAMS. Testimony varied as to the salary actually paid, from approximately $2,000 to $25,000 per year. The latter

figure is approximately half of what Mr. Autrey earned as general manager of NAMS. No evidence was offered as to whether NAMS has paid a dividend to Mr. Vawter, the sole shareholder. This benefit structure is not consistent with the notion that a corporation is formed for the benefit of its shareholders, and contributes to the impression that NAMS actually exists for the benefit of Vaughn Autrey.

Final Conclusion

As discussed, the issue in this case is whether NAMS is "100 per cent Indian controlled." I conclude that, in order to establish such control, appellant must show some active Indian participation in the corporation, and that such participation contribute to the stated legislative intention to further Indian self-sufficiency. Evidence presented by appellant did not prove, by even a preponderance of the evidence, that Elbert Vawter's participation in NAMS contributes to such a goal. Therefore, I recommend respondent's decision suspending appellant's "Buy Indian" status be affirmed.

//original signed
Harvey C. Sweitzer
Administrative Law Judge